United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

State Building dated July 1954 (106a-107a)

75-7045

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Appeal No. 75-7045

ARROW NOVELTY COMPANY, INC.,

Plaintiff-Appellee,

v.

ENCO NATIONAL CORPORATION,

Defendant-Appellant.

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ARROW NOVELTY COMPANY, INC., Plaintiff-Appellee, vs. ENCO NATIONAL CORPORATION. Defendant-Appellant.	Appeal No. 75-7045

BRIEF FOR APPELLANT

I. PRELIMINARY STATEMENT

This is an appeal from a final judgment entered December 26, 1974 in the United States District Court for the Southern District of New York (18a). Said judgment was entered pursuant to an opinion dated October 30, 1974 which was issued by Judge Lee P. Gagliardi subsequent to a two-day non-jury trial. The District Court in said opinion held that defendant had infringed plaintiff's Copyright No. Gp23714 (10a - 17a).

II. THE ISSUES PRESENTED FOR REVIEW

1. Was the District Court's finding that defendant's accused New York City tray was an infringement of plaintiff's Copyright No. Gp23714 and a copy of plaintiff's allegedly copyrighted New York City tray clearly erroneous?

Appellant would answer "yes".

(a) Was the District Court's finding that the parties' respective trays were remarkably similar so that copying by defendant could be inferred clearly erroneous?

Appellant would answer "yes".

(b) Was the District Court's finding that defendant's accused New York City tray was a copy of the specific expression of plaintiff's allegedly copyrighted New York City tray clearly erroneous?

Appellant would answer "yes".

(c) Was the District Court's finding that the similarities between defendant's accused New York City tray and plaintiff's allegedly copyrighted New York City tray were so great so as to preclude a finding of independent creation by defendant of its New York City tray clearly erroneous?

Appellant would answer "yes".

2. Did the District Court err in admitting into evidence plaintiff's New York City tray (PX-2) and comparing defendant's accused New York City tray (PX-3) with said plaintiff's New York City tray to find infringement of Copyright No. Gp23714 when plaintiff failed to prove that said plaintiff's tray was covered by said Copyright Certificate, if indeed, copyrighted at all?

Appellant would answer "yes".

3. Did the District Court err in allowing alleged statements made by a former employee of defendant to be admitted into evidence despite the fact said statements were hearsay?

Appellant would answer "yes".

III. STATEMENT OF THE CASE

This is an action for copyright infringement. A two-day non-jury trial was held in the United States District Court for the Southern District of New York on September 10th and 11th, 1974.

The District Court, in an opinion dated October 30, 1974, found that defendant had infringed plaintiff's copyright (10a - 17a). The Court's opinion constituted its findings of fact and conclusions of law under Rule 52 F.R. Civ. P.

Plaintiff did not seek damages or attorneys' fees and submitted a proposed final judgment that was entered on December 26, 1974 which permanently enjoined defendant from selling its accused New York City tray (18a).

Defendant appeals from the final judgment (19a).

IV. THE PARTIES

Plaintiff, Arrow Novelty Company, Inc. (hereinafter "Arrow") is a corporation organized and existing under the laws of the State of New Jersey and has its principal place of business at 143 2nd Street, Jersey City, New Jersey (3a).

Defendant, Enco National Corporation (hereinafter "Enco") is a corporation organized and existing under the laws of the State of New York with its principal place of business at 120 East 23rd Street, New York, New York (3a, 8a).

Both Arrow and Enco sell a variety of novelty items including souvenir trays.

New York City tray has the same tangible expression

V. THE TESTIMONY AT THE TRIAL

Plaintiff's first witness was Isidore Brown who is the President of Arrow (20a). Mr. Brown testified that he had been employed by Arrow since 1961 (20a). During Mr. Brown's testimony, Copyright Certificate No. Gp23714 (PX-1) was received in evidence (21a, 22a). Arrow offered into evidence a tray (PX-2) which it claimed was the copyrighted work that was protected by the aforesaid Copyright Certificate (23a, 24a). Enco objected on the basis that there was no connection between PX-2 and the aforesaid Copyright Certificate.* Enco urged that unless Arrow showed that PX-2 was an example identical to what was deposited in the Copyright Office to obtain the copyright certificate sued upon, then PX-2 was irrelevant to

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*To register a copyright and obtain a copyright certificate, the applicant must submit to the Register of Copyrights an application and two identical copies of the work which is the subject of the copyright. If the application is approved, then a copyright certificate is issued which grants to the copyright owner the right to prevent others from copying the work which was deposited and which is the subject of the copyright. Section 13 of Title 17, which is the applicable section of the copyright statute, provides as follows:

> "After copyright has been secured by publication of the work with the notice of copyright as provided in section 10 of this title, there shall be promptly deposited in the copyright office or in the mail addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published... No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with."

the present lawsuit (23a, 24a). The Court received PX-2 in evidence subject to connection (23a, 24a); none was forthcoming.

PX-3 is Enco's accused tray (28a).

Mr. Brown testified he knew a man named Aaron Slabodsky, that Mr. Slabodsky was the former domestic buyer for Enco and the New York City salesman for Enco (33a). Mr. Brown testified he had a conversation in June or July of 1973 with Mr. Slabodsky, and the Court, over Enco's objection, allowed Mr. Brown to testify that Mr. Slabodsky said Enco had "knocked off" Arrow's New York City tray (33a, 34a, 35a, 36a).

On cross-examination, Mr. Brown was asked if he had any personal knowledge of what was deposited with the Copyright Office in order to obtain the copyright in suit. Mr. Brown answered "no" (36a, 37a).

On the conclusion of the cross-examination of Mr. Brown, Enco moved to strike PX-2 on the ground that there was no connection whatsoever between PX-2 and the copyright certificate sued upon. The Court denied the motion (41a).

Prior to the trial, Arrow took the deposition of Robert C. Stevens; his deposition was used at trial. Mr. Stevens is the president of Multi-Products, Inc., a Chicago manufacturing company. Multi-Products, Inc. is the company that manufactures plaintiff's New York City tray (59a, 60a).

Mr. Stevens was asked about certain conversations he allegedly had with Mr. Slabodsky. Enco objected to using

Mr. Stevens' testimony to show what Mr. Slabodsky allegedly said but this objection was overruled (61a, 62a). Mr. Stevens testified Mr. Slabodsky said he was interested in Multi-Products manufacturing a New York City tray for Enco and that Enco could do a better job with the New York City tray than Arrow (62a, 63a). Mr. Stevens said Mr. Slabodsky told him he was aware of the Arrow New York City tray (64a).

Mr. Passella, a long-time employee of Arrow, testified on behalf of Arrow in an attempt to show that the plaintiff's tray, PX-2, was covered by the copyright certificate in suit. However, he could not do so. Under cross-examination, Mr. Passella testified:

> "Q. ...You don't have personal knowledge of what was deposited in the Copyright Office to obtain the Certificate which comprises plaintiff's Exhibit 1 in evidence, is that correct?
>
> A. In all of the years that I --
>
> Q. Could you answer the question?
>
> A. I just told you I don't." (70a).

At this time, Enco moved to strike PX-2 which had been admitted subject to connection on the ground that there had been no connection shown by plaintiff between PX-2 and the copyright certificate sued upon (71a).

The following discussion between Mr. Patton, counsel for plaintiff, Mr. Cobrin, counsel for defendant, and the Court is relevant:

> "MR. COBRIN: The first motion I would like to make is, I move to strike Plaintiff's Exhibit 2 which was admitted subject to connection. There has been no connection showing what was precisely deposited in the Copyright Office.

Now, we don't know whether this is the item which the Copyright Office granted protection on. Plaintiff has chosen not to prove it, and this item is absolutely irrelevant without showing some connection.

The Copyright Office issues the certificate based on the applicant depositing two identical copies and the certificate covers what they deposited. There has been no proof here as to what was deposited with the Copyright Office.

THE COURT: Why can't that be ascertained? If it is just a technicality why can't it be ascertained other than just a certificate and some other item coming in? Granted you may have some difficulty where people are dead --

MR. PATTON: I confess I really don't know what law --

THE COURT: Can't you get a certificate out of the Copyright Office that this is the same? I should think they would do those things; like any other governmental document, if that is so, then it becomes prima facie evidence.

Now since the issue has been raised -- circumstantially it may be the same item, but where it is subject to absolute proof, why do we need to have this as a problem?

MR. PATTON: I was not aware, I confess, that it was a problem.

THE COURT: Well, he has raised the issue. It may be a technical thing, but he has got the right to raise any issue that comes up.

MR. PATTON: Frankly I was not aware that there was any additional legal burden on me other than first putting in the certificate which describes the ball*, its size, its weight --

MR. COBRIN: I don't believe it describes the size.

MR. PATTON: It describes the size and weight. There has been no other bowl.

THE COURT: Just a moment.

Do we have a ruler in the courtroom?

THE CLERK: No, sir.

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*Sic. ball

York City tray and Arrow's New York City tray are readily.

THE COURT: Can you tell me whether these are the dimensions specified in here, 10-1/2 inches by 11-3/4 inches, and does it weigh 1 pound 2 ounces?

MR. PATTON: I can represent that it does, your Honor.

THE COURT: All right, I will deny the motion on that ground." (71a, 72a, 73a)

Despite the court's invitation, Arrow did not verify what was deposited in the Copyright Office to obtain the copyright certificate in suit although this could easily have been done by obtaining a certified photograph of what was deposited. This assumes, of course, that a tray corresponding to PX-2 had, in fact, been deposited with the application which resulted in the issuance of the copyright certificate in suit.

Enco called as its first witness Mr. Steinberg who is the Vice President of Sales of Enco (74a). Mr. Steinberg testified that he obtained PX-4 which is a tray depicting scenes from Las Vegas at the end of January, 1973 at the Circus Circus Hotel in Las Vegas (75a). He said that he checked the tray for copyrights and trademarks and did not find any (75a). Mr. Steinberg purchased the tray with the thought that it could be used as a basis by Enco for making souvenir items for areas throughout the United States (75a).

Mr. Steinberg discussed the Las Vegas tray with Mr. Bendell who is the overseas buyer for Enco during February or March of 1973. Mr. Bendell and Mr. Steinberg discussed featuring the landmarks for a particular locale on a tray to be sold in that locale. Specifically, a New York City tray was discussed, and it was decided that Enco would go ahead with

suit.

the manufacture of a New York City tray (75a, 76a, 77a).

Mr. Steinberg testified that prior to the lawsuit he had never seen an Arrow tray which depicted scenes of New York City, that he had not known of said tray, and that he had never discussed said tray with Mr. Bendell. Mr. Steinberg further testified he never discussed the Arrow tray at any time with Aaron Slabodsky and that he never discussed the manufacture of Enco's own tray with Aaron Slabodsky. Still further, Mr. Steinberg testified that he first learned of the Arrow tray at the start of the present lawsuit (77a, 78a). Mr. Steinberg's testimony directly contradicted the hearsay testimony of Mr. Brown and Mr. Stevens relating to the alleged statements made by Mr. Slabodsky who had been discharged by Enco some time before this suit was brought (79a).

Enco's next witness was Mr. Bendell, the overseas buyer for Enco (94a). He described his job as purchasing and evaluating merchandise acquired overseas and imported into the United States for sale by Enco's sales force (94a, 95a).

Mr. Bendell testified that he had been shown the Las Vegas tray (PX-4) by Mr. Steinberg and discussed it with him in early 1973 (98a, 99a). He testified that he intended to have trays made for Enco having the same size, shape and coloring as PX-4 with the only difference being that he was planning to have the designs on the tray coincide with the various areas where the trays would be sold, e.g. New York City and Florida (99a, 100a, 128a).

Mr. Bendell testified that he went on a buying trip in 1973 subsequent to his discussions with Mr. Steinberg (100a).

Mr. Passella, called by Arrow in an effort to connect PX-2 with

The buying trip took him to Japan where he made arrangements for the manufacture of Enco's accused tray. The factory where the tray was to be made was Matsudo (100a, 101a). Mr. Bendell testified he gave to Matsudo the Las Vegas tray (PX-4) and that he wanted Matsudo to make the Enco New York City tray so as to be identical in size and shape thereto and have a similar brown wood finish color (101a).

Mr. Bendell gave specific instructions to Matsudo as to the design of the tray interior. He told Matsudo that he wanted five landmarks to be shown on the tray, these being the Statue of Liberty, Rockefeller Center, the Empire State Building, the World Trade Center, and the United Nations Building. These landmarks were selected by Mr. Bendell because they were the five most popular sight-seeing sites in New York City at that time (102a, 103a).

Matsudo was instructed by Mr. Bendell to place Rockefeller Center on the left of the tray, the Statue of Liberty in the center and the World Trade Center between the Statue of Liberty and Rockefeller Center. In addition, Matsudo was instructed to place the United Nations Building between the Statue of Liberty and the Empire State Building. Mr. Bendell instructed Matsudo to place an airplane in the left hand corner to signify the two major airports which are well known in New York City and a rose in the upper right hand corner. The rose was chosen because it is the New York State Flower (102a, 103a).

Matsudo was further instructed by Mr. Bendell to make a skyline waterfront scene and to make sure that the five major

landmarks which were to be on the New York City tray were titled with their names (103a).

Finally, Mr. Bendell instructed Matsudo that the lettering for the words New York City should be placed on the upper portion of the tray (103a).

Matsudo was given certain art work and samples by Mr. Bendell. The purpose in giving Matsudo art work and samples was to provide Matsudo with materials to work with so that Matsudo could make renditions of the landmarks involved. Mr. Bendell testified that this was his usual way of doing business (103a, 104a).

Mr. Bendell testified that he gave Matsudo DX-A as art work to utilize (104a, 105a). DX-A is the art work for a placemat sold by Enco since 1972, a sample of said placemat being DX-B (106a). As with the Enco tray, DX-A contains depictions of the Statue of Liberty, Rockefeller Center, the United Nations Building and the World Trade Center. DX-A, like the Enco tray, includes a "New York City" heading at the uppermost portion. It is important to note that the rendition of Rockefeller Center on Enco's accused tray (PX-3) is identical to the rendition of Rockefeller Center on DX-A. The rendition of Rockefeller Center on DX-A and on Enco's accused tray is completely different from the rendition of Rockefeller Center on the Arrow New York City tray (PX-2). The United Nations and Statue of Liberty renditions on DX-A are the same as those on the Enco tray and significantly different from the renditions for these landmarks on the Arrow tray.

DX-C was given to Matsudo and is a picture of the Empire

State Building dated July, 1954 (106a, 107a).

DX-D was given to Matsudo and is art work for a mirror box. DX-D includes renditions of the Empire State Building, the Statute of Liberty, Rockefeller Center and the World Trade Center (107a, 108a).

DX-E is a specimen of said mirror box which has been sold by Enco since 1972 (108a).

DX-F was given to Matsudo and is a postcard containing an artist's rendition of the World Trade Center. Mr. Bendell felt that Matsudo would be able to use the artist's rendition of the World Trade Center contained on DX-F in designing Enco's tray (109a).

DX-G was given to Matsudo and contains art work for a drinking mug (DX-H) sold by Enco since 1967 (109a, 110a). DX-G contains renditions of the Statue of Liberty, the Empire State Building and Rockefeller Center. DX-G also contains an airplane, the United Nations Building and a waterfront scene. As on the Enco tray there is lettering on DX-G identifying each landmark and the words "New York City" appear thereon. It is important to note that there is a curved pencil line on DX-G placed thereon by Mr. Bendell indicating to Matsudo that he wanted a curved waterfront scene and not a horizontal waterfront as shown in DX-G* (110a).

Mr. Bendell testified that DX-I was given to Matsudo and is the art work for the telescope sold by Enco since 1971. A

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*The curved pencil line could not be reproduced on the copy of DX-G in the appendix but can be seen on the original exhibit.

sample of the telescope was marked as DX-J (112a, 113a).

DX-I depicts the Statue of Liberty, the Empire State Building, the United Nations Building and Rockefeller Center. In addition, DX-I shows the New York City waterfront and a cloud effect of the type appearing on Enco's accused tray.

DX-K was given to Matsudo and is art work for a tray sold by Enco since June, 1973, a sample of said tray being DX-L (114a, 115a).

DX-K contains the United Nations Building, the Empire State Building, Rockefeller Center and the Statue of Liberty. DX-K also includes a rose which appears on the Enco tray.

DX-M was given to Matsudo and contains renditions of the Empire State Building, the Statue of Liberty, the United Nations Building, Rockefeller Center and includes the New York skyline (116a).

DX-M contains the same rendition of the Empire State Building as appears on the Enco New York City tray which rendition is completely different from that on the Arrow New York City tray.

Mr. Bendell testified that DX-N was given to Matsudo. DX-N is original art work prepared by Enco artists and contains the Empire State Building, the Statue of Liberty, Rockefeller Center, the World Trade Center and the United Nations Building. In addition, DX-N contains an airplane, a skyline waterfront view and a rose. On DX-N, all of the various landmarks have titles just as on the Enco New York City tray. DX-N is the art work for a plate sold by Enco since February, 1973, one of the plates being DX-O (117a, 118a).

DX-P, which was given to Matsudo, is a reference type art work and contains renditions of the Statue of Liberty, the Empire State Building, Rockefeller Center, the United Nations and an airplane. It also contains a New York City waterfront of the same type that is used on Enco's tray. DX-P is about seven or eight years old and contains handwritten notes.* More specifically, the notation "full BLDG." appears next to both the Empire State Building and Rockefeller Center indicating Mr. Bendell's instructions to Matsudo that he did not want either building to be abbreviated when placed on the tray. The reason for this is that very frequently the bottom of a building is omitted when placed on an item, and to avoid any chance of this happening, Mr. Bendell placed the aforesaid notations on DX-P. Mr. Bendell testified that he would cut a portion of the exhibit containing a rendition of a landmark and use the cut paper as art work for Enco's products as required (119a, 120a, 121a).

DX-Q was given to Matsudo and is a small telephone directory which contains renditions of the Empire State Building, the Statue of Liberty and Rockefeller Center. These renditions are identical to those on Enco's accused tray. In addition, DX-Q contains a ring of roses (121a, 122a).

DX-R was given to Matsudo and is the art work of a New York State design. DX-R was created more than ten years ago and contains the Empire State Building, the Statue of Liberty, Rockefeller Center, and the United Nations as well as an airplane

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*The handwritten notes could not be reproduced on the copy of DX-P in the appendix but can be seen on the original exhibit.

and roses (122a, 123a).

DX-S was given to Matsudo and is an address and telephone book of a larger size than DX-Q but otherwise identical. DX-Q has been sold since May of 1971 (124a).

DX-T is a metal tray given to Matsudo that was first marketed by Enco in May of 1971. DX-T contains the very five landmarks that are featured on Enco's accused tray. Still further, the renditions of the landmarks on Enco's accused tray are identical in design to the renditions on DX-T. In addition, DX-T contains a rose as well as a New York City waterfront, both of which appear on the Enco tray. Mr. Bendell testified that aside from the fact that DX-T contained all the landmarks he wanted on the accused Enco tray, it was given to Matsudo because it had a raised three-dimensional effect which he thought would be of assistance to Matsudo in designing the Enco New York City tray (124a, 125a).

DX-U, U-A and U-B are replicas, respectively, of the Empire State Building, the Statue of Liberty and the Empire State Building. All were given to Matsudo to further illustrate the buildings which were to be shown on the Enco tray (126a, 127a).

Mr. Bendell testified that Matsudo presented him with a design on which corrections were made and that subsequently a final design (DX-V) was presented which he approved (127a, 128a).

In addition to making the New York City tray, Matsudo made for Enco a Florida tray, DX-W, which is identical in size, shape and configuration to Enco's New York City tray and the Las Vegas tray (PX-4). DX-W contains features and landmarks of Florida (128a).

Mr. Bendell further testified that prior to the lawsuit, he (1) never discussed with Mr. Steinberg or anybody else the Arrow New York City tray; (2) he did not know of said tray; and (3) that he did not see said Arrow tray (128a, 129a). He testified he never discussed the Arrow tray with Mr. Slabodsky at any time whatsoever and that Mr. Slabodsky had nothing whatsoever to do with the creation and design of the Arrow tray (129a).

Mr. Ficker, Enco's last witness, has been an employee of Enco for nineteen years. He has been head of the Enco Special Order Department and Art Director at Enco (150a, 151a).

Mr. Ficker testified that DX-A, DX-D, DX-G, DX-I, DX-K, DX-M, DX-N, DX-P, DX-Q, DX-S and DX-T all contained or were original art work of Enco (151a, 152a, 153a).

The other exhibits which were marked during Mr. Bendell's testimony contain the art work of DX-A, DX-D, DX-G, DX-I, Dx-K, DX-M, DX-N, DX-P, DX-Q, DX-S and DX-T or are three-dimensional models or pictures or postcards.

VI. ARGUMENT

POINT 1: There are insufficient similarities between Enco's tray and Arrow's tray to support an inference of copying.

There was no direct credible evidence at trial to show that Enco had copied Arrow's New York City tray. On the contrary, the overwhelming weight of the testimony at trial was that Enco had created its tray independently of Arrow's New York City tray. Despite this, the District Court inferred copying by Enco on the basis of the similarities between Enco's New York City tray and Arrow's New York City tray. Enco submits that the District Court

was clearly erroneous in finding that an inference of copying existed from the products themselves.

As pointed out above, the similarities between Enco's New York City tray and Arrow's New York City tray are those similarities which are inherent in two trays depicting landmarks of New York City. Still further, a visual comparison of Enco's New York City tray and Arrow's New York City tray shows that the similarities between the trays are not substantial.

In ARC Music Corp. v. Lee, 296 F.2d. 186 (2nd Cir., 1961), the court in affirming a lower court judgment dismissing a cause of action for copyright infringement held that copying or a substantial similarity must be shown to support an inference of copying. More specifically, the court stated:

> "And it is not an unnatural step in inference of fact for ease of access to suggest a deduction of copying when similarity is found. But access will not supply its lack, and an undue stress upon that one feature can only confuse and even conceal this basic requirement. See Continental Cas. Co. v. Beardsley, 2 Cir., 253 F.2d 702, 705, certiorari denied 358 U.S. 816, 79 S.Ct. 25, 3 L.Ed.2d 58; Arnstein v. Edward B. Marks Music Corp., 2 Cir., 82 F.2d 275, 277; Arnstein v. Broadcast Music, 2 Cir., 137 F.2d 410, 412." pp. 187, 188.

Applying the holding of the ARC Music Corp. case to the facts at hand, it is submitted that no inference of copying can be made since the testimony clearly rebuts copying and there are insufficient similarities between Enco's New York City tray and Arrow's tray.

POINT 2: The District Court erred in finding that Enco's New York City tray has the same tangible expression of a New York City tray as Arrow's New York City tray.

The District Court in its opinion found that Enco's New York City tray and Arrow's New York City tray bear a remarkable similarity and that Enco's tray is a copy of Arrow's tray. Enco submits that this finding is clearly erroneous.

There can be no doubt but that Arrow's New York City tray and Enco's New York City tray are generally similar in that they both depict landmarks of New York City and are for the same broad idea, i.e., a New York City tray. However, the specific New York City landmark renditions are substantially different.

In this connection, it is noted that the rendition of Rockefeller Center on Arrow's New York City tray is completely different from the rendition of Rockefeller Center on Enco's New York City tray.* The rendition of Rockefeller Center on Arrow's New York City tray is a plan view from Fifth Avenue looking towards the ice skating rink. On the other hand, the rendition of Rockefeller Center on the Enco New York City tray is a perspective view from Sixth Avenue and 50th Street looking north.

Still further, the rendition of the Empire State Building on Arrow's New York City tray and Enco's accused tray are substantially different.** On the Arrow New York City tray, the base

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*As mentioned on page 11 of this brief, the rendition of Rockefeller Center on the Enco tray is identical to the rendition of Rockefeller Center on DX-A.

**The rendition of the Empire State Building on Enco's New York City tray is identical to that on DX-M.

of the building is not included, whereas on the Enco accused tray the entire building is shown. The details of the Empire State Building on the Enco New York City tray are different from the details on the Empire State Building on the Arrow New York City tray.

The rendition of the United Nations Building on the Enco accused tray is completely different from the rendition of the United Nations Building on the Arrow New York City tray.* More specifically, the rendition of the United Nations Building on the Enco accused tray is a perspective view showing the General Assembly Building and the United Nations Office Building. On the other hand, the view of the United Nations on the Arrow New York City tray shows the front of the United Nations Office Building and does not clearly show the General Assembly Building.

The rendition on the Enco New York City tray of the Statue of Liberty is different from the rendition of the Statue of Liberty on the Arrow New York City tray.** More specifically, on the Enco New York City tray, a portion of the base of the Statue of Liberty is omitted. On the Arrow New York City tray, the entire base of the Statue of Liberty is shown. Furthermore, the details on the portion of the base of the Statue of Liberty shown on the Enco New York City tray are different from the details on the com-

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*The rendition of the United Nations Building on the Enco New York City tray is identical to the rendition of the United Nations Building on DX-A.

**The rendition of the Statue of Liberty on the Enco New York City tray is identical to the rendition of the Statue of Liberty on DX-A.

parable section of the base of the Statue of Liberty on the Arrow New York City tray.

On the Enco New York City tray, a rendition of the World Trade Center appears. The Arrow New York City tray does not include a rendition of the World Trade Center.

It is well settled that a copyright cannot cover an idea but only a specific expression of that idea. In Baker v. Selden, 101 U.S. 99 (1879), the Supreme Court held that there can be no copyright protection on an idea itself but only on the tangible expression of the idea.

In Uneeda Doll Co., Inc. v. P & M Doll Co., 353 F.2d 788 (2nd Cir. 1965), the copyright in issue was on a doll. An appeal was taken from an order denying a preliminary injunction. The District Court in denying the preliminary injunction noted that the tangible expressions of the copyrighted doll and the accused doll were not the same even though the general idea of each doll was the same. In affirming, the Court of Appeals noted that a copyright cannot cover an idea but only the tangible expression of the idea, stating:

> "It is well settled that there can be no copyright on an 'idea' itself but only on the tangible 'expression' of the idea. Baker v. Selden, 101 U.S. 99, 25 L.Ed. 841 (1879)." p.788

Here, it is submitted that Arrow's New York City tray and Enco's New York City tray, while both directed to the same idea of a tray depicting landmarks from New York City, do so in entirely different ways; accordingly, there can be no copyright infringement. In this regard, it is important to note that the specific rendition of each landmark on Enco's New York

City tray is different from the rendition for the same landmark on the Arrow New York City tray. Any similarities in the trays result from the fact that they embody the same general idea. Naturally, New York City souvenir trays will of necessity include famous New York City landmarks.

In summary, Enco urges that the District Court erroneously expanded the scope of Arrow's copyright so as to cover Enco's New York City tray which has distinctively different specific landmark renditions than are found on the Arrow New York City tray.

POINT 3: The District Court erred in finding that there were sufficient similarities between Enco's New York City tray and Arrow's New York City tray to preclude a finding of independent creation of defendant.

At the trial, Messrs. Steinberg and Bendell each testified they had not seen the Arrow New York City tray prior to the present lawsuit, that each did not know of said tray prior to the lawsuit, and that the Enco New York City tray was created independently of the Arrow New York City tray. The District Court rejected this testimony on the ground that Enco's New York City tray was substantially similar to Arrow's New York City tray so as to preclude a finding of independent creation by Enco of its accused tray. Had the court not rejected this testimony, Enco would have had a complete defense to a claim of copyright infringement.*

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*In this regard, the Court's attention is invited to Stratchborneo v. ARC Music Corp., 357 F.Supp. 1393 (S.D.N.Y. 1973).

It is clear that the similarities between Enco's New York City tray and Arrow's New York City tray are readily explainable. First of all, both trays are brown and have a wood-like appearance. Enco derived the shape, color and configuration of its New York City tray from the Las Vegas tray (PX-4) which is in the public domain.* At the time the Enco tray was designed in 1973, the five outstanding New York City landmarks were Rockefeller Center, the Statue of Liberty, the Empire State Building, the United Nations Building and the World Trade Center.

Identifying titles have been used by Enco in the past, and the use of said titles by Enco on the accused tray was a continuation of a past design technique.

A rose, which is the New York State Flower, has been used by Enco in the past on souvenir items for New York as testified to by Mr. Bendell. Of course, the use of the State Flower is open to anyone.

A waterfront scene is a standard background of Enco for New York City souvenir items as was testified to by Mr. Bendell.

Whatever similarities exist between Arrow's New York City tray and Enco's New York City tray are those similarities inherent in a tray depicting landmarks of New York City and are not proof of copying. In this regard, Enco wishes to point out that both Messrs. Steinberg and Bendell denied that

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*There are no copyright notices on PX-4.

they had ever seen or heard of the Arrow tray prior to this suit.

The District Court rejected the testimony of Messrs. Steinberg and Bendell. This was clearly erroneous since the testimony of Messrs. Steinberg and Bendell provides a satisfactory explanation as to the derivation of the Enco New York City tray. The similarities between the Enco New York City tray and the Arrow New York City tray are surely not sufficient to support a finding of copying in view of defendant's proof of independent creation.

POINT 4: The District Court erred in admitting into evidence over Enco's objections Arrow's New York City tray (PX-2) and comparing Enco's New York City tray with said New York City tray of Arrow to find copyright infringement of Copyright Certificate No. Gp23714.

Enco submits that it was improper and erroneous for the District Court to admit into evidence Arrow's New York City tray (PX-2) and compare Enco's New York City tray with said Arrow New York City tray as a basis for finding that Enco had infringed Copyright Certificate Gp23714.

Copyright Certificate No. Gp23714 was issued as a result of Arrow submitting to the Copyright Office an application and two identical works constituting the required deposit of the copyrighted work (17 U.S.C. 13). Upon receipt of the works, the Copyright Office issued the Certificate in accordance with 17 U.S.C. 13, supra.

PX-2 was received in evidence during Mr. Brown's testimony over Enco's objection subject to connection (23a, 24a). Mr. Brown on cross-examination testified that he had no personal knowledge of what was deposited with the Copyright Office in

order to obtain the copyright certificate sued upon (40a, 41a). Mr. Passella, called by Arrow in an effort to connect PX-2 with PX-1, testified that he did not know what was submitted to the Copyright Office to obtain Copyright Certificate No. Gp23714 (69a, 70a). Clearly, connection was not made.

The District Court apparently denied Enco's motion to strike PX-2 on the totally inadequate basis that the dimensions of PX-2 were the same as the dimensions set forth on Copyright Certificate No. Gp23714. The similarity in dimensions is no proof whatsoever that what was sent to the Copyright Office had the same appearance as PX-2. The tray sent to the Copyright Office could have been a souvenir tray for locales other than for New York or could have been another altogether different type of tray. Nor does Arrow's testimony that this was its only New York City tray help -- such testimony does not show that the specific New York City tray of which PX-2 is an example is what was, in fact, deposited to obtain the copyright sued upon and that it is, in fact, the copyrighted work. In view of the fact that there was absolutely no evidence offered by Arrow connecting PX-2 with the copyright certificate in suit, it was erroneous for the District Court to allow PX-2 into evidence and to compare Enco's New York City tray with PX-2 to find that Enco had infringed Copyright Certificate No. Gp23714.

It is believed that the prejudice to Enco in admitting PX-2 is obvious. Without PX-2 in evidence, there was a complete failure of proof by Arrow -- there was nothing to show what was copyrighted and thus nothing on which to base a finding of copying and copyright infringement.

POINT 5: The District Court erred in allowing alleged statements made by a former employee of Enco to certain individuals to be admitted into evidence through said individuals' testimony when said statements were hearsay.

The District Court over Enco's objections allowed into evidence Mr. Brown's testimony that Mr. Slabodsky told Mr. Brown Enco had knocked off (copied) Arrow's New York City tray (35a, 36a).

In addition, the District Court allowed into evidence over Enco's objections Mr. Stevens' testimony that Mr. Slabodsky told Mr. Stevens he was interested in Multi-Products manufacturing a New York City tray for Enco and that Enco could do a better job with the New York City tray than Arrow (61a, 62a, 63a, 64a).*

Enco submits that it was an error for the District Court to allow statements by Mr. Slabodsky to individuals to be received in evidence through said individuals' testimony.

In Schner v. Simpson, 286 App.Div. 716 (1955) the court stated:

> "Generally speaking, employment does not carry authority to make either declarations or admissions. In such cases, the question is one of agency and the agent's authority to make the admissions or declarations must first be shown. Chamberlayne, Trial Evidence, 2d Ed., 842." (emphasis supplied)

In Maggio v. Mid-Hudson Chevrolet, 34 A.D. 2d 567 (1970) the court refused to allow a hearsay statement made by defendant's

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*If Mr. Stevens' testimony as to what Slabodsky said was merely to show a conversation had taken place as the District Court stated (63a), then it was error to allow Stevens to testify as to the substance of the conversation after it had been established that a conversation had taken place. Moreover, the fact that a conversation took place is wholly irrelevant. The testimony has no point unless offered for the truth of what was asserted by Mr. Slabodsky, and if offered for that purpose, it is hearsay of the clearest kind.

service manager unless it had been shown that the service manager had been authorized to make the statement on defendant's behalf.

Since the court's opinion may well have been affected by the hearsay admitted into evidence, the error in admitting it was prejudicial. Indeed, the error was expressly prejudicial to Enco since the Slabodsky statements were the only oral testimony contradicting the claims of Messrs. Steinberg and Bendell that Enco independently created its tray.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the court should reverse the judgment of the District Court and direct that the complaint be dismissed with costs and attorneys' fees awarded to Enco.

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February 7, 1975

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ARROW NOVELTY COMPANY, INC., Plaintiff-Appellee, v. ENCO NATIONAL CORPORATION, Defendant-Appellant.	Appeal No. 75-7045

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF SERVICE

I, Peter T. Cobrin, being duly sworn, depose and say:

1. I am a partner in the law firm of KIRSCHSTEIN, KIRSCHSTEIN, OTTINGER & FRANK, P.C.

2. On February 7, 1975, I placed in a stamped self-addressed envelope three copies of Appellant's Brief and mailed them to Thomas Patton, Esq., counsel for Appellee, care of Williams, Connolly & Califano, 1000 Hill Building, Washington, D.C. 20006.

PETER T. COBRIN

Sworn to before me this
7th day of February, 1975

NOTARY PUBLIC

BERTRAM OTTINGER, Notary Public
State of New York, Qual. in Nassau Co.
No. 30-5244685
Commission Expires March 30, 1976

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v.

ENCO NATIONAL CORPORATION,

Defendant-Appellan

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